

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20170525**

**Docket: A-304-16**

**Citation: 2017 FCA 109**

**CORAM: DAWSON J.A.  
DE MONTIGNY J.A.  
GLEASON J.A.**

**BETWEEN:**

**BRAD GLADMAN**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on May 2, 2017.

Judgment delivered at Ottawa, Ontario, on May 25, 2017.

**REASONS FOR JUDGMENT BY:**

**GLEASON J.A.**

**CONCURRED IN BY:**

**DAWSON J.A.  
DE MONTIGNY J.A.**

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Appellant

and

ATTORNEY GENERAL OF CANADA

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**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] Dr. Gladman appeals from the judgment of the Federal Court in *Gladman v. Attorney General of Canada*, 2016 FC 917 (available on CanLII), dismissing his application for judicial review of the September 3, 2015 decision of the Deputy Minister of National Defence. In that decision, the Deputy Minister denied Dr. Gladman's application for a promotion to a more senior classification level.

[2] For the reasons that follow, I would dismiss this appeal with costs in the all-inclusive amount proposed by the parties.

I. Background

[3] Dr. Gladman works as a Defence Scientist (DS) at the Department of National Defence (DND). At the times relevant to this appeal, he was classified at the DS-04 level. According to the *DS Salary Administration System, Part IV – DS Promotion and Salary Advancement Guidelines* (DS Salary Administration System), which embodies the DS classification standard and the rules governing promotions for incumbents who are so classified, the DS-04 level is the working level classification for experienced DND scientists who “demonstrated the ability to work independently under general supervision or direction” (DS Salary Administration System, para. 49, Appeal Book, Vol. 1, p. 123).

[4] In January 2015, Dr. Gladman submitted an application to be promoted to the DS-05 level, the senior working level for DND scientists who had “established a reputation, mastery and leadership in a complex field of [Defence Scientific Research Development and Analysis]” (DS Salary Administration System, para. 57, Appeal Book, Vol. 1, p. 128). To qualify for this level, an incumbent’s abilities must have been “consistently demonstrated” (DS Salary Administration System, para. 57, Appeal Book, Vol. 1, p. 128).

[5] The DS Salary Administration System provides for a level determinant standard that describes the characteristics of each classification level as opposed to setting out a points-based system for evaluation. Competencies for each level against which incumbents’ abilities and

performance are measured are listed in the DS Salary Administration System and include “knowledge and expertise”, “personal interactions and communication”, “creativity”, “productivity”, “impact”, “recognition” and “responsibilities”. The DS Salary Administration System sets out descriptions for each of these competencies that pertain to the various DS classification levels.

[6] Of particular relevance to this appeal is the descriptor for the “impact” competency for the DS-05 level. It requires that an incumbent demonstrate that he or she “[h]as made superior impacts on client policy, equipment, engineering, or operational issues, by exploiting the application of technology and/or defence scientific analyses” (DS Salary Administration System, para. 58, Appeal Book, Vol. 1, p. 132). The “rationale” and “notes” for this descriptor require that an incumbent “has provided solutions to clients that have had impacts resulting in improved military capabilities or resource savings. These activities are expected to be complex, influential and non-routine” (DS Salary Administration System, para. 58, Appeal Book, Vol. 1, p. 132). As is discussed in more detail below, Dr. Gladman’s application for promotion to the DS-05 level was refused in part because he did not demonstrate that he met this competency.

[7] The promotion process for employees in the DS classification at DND was developed following discussion with the applicable bargaining agent and is incumbent-based, providing for employees’ career progression as they gain expertise. Thus, contrary to the situation with many public servants, employees in the DS classification at DND are classified based on their state of professional development and move from one classification to the next when and if they have demonstrated the competencies of the higher classification.

[8] In order to obtain a promotion, employees in the DS classification are required to submit a Performance Evaluation Report (PER) to the DS Career Progression Committee. The PER is completed by the employee and his or her managers, with management having the final say as to the contents of the PER. However, if they wish, employees may provide additional comments in the PER if they disagree with or want to add to the text of the PER finalized by their managers.

[9] The Career Progression Committee is chaired by DND's Assistant Deputy Minister (Science and Technology) and is comprised of a number of members of senior management and scientists, with a human resources professional acting as the secretary. In 2015, in addition to the Chairperson and the HR professional, there were twelve more members on the Committee, one of whom was Dr. Gladman's manager.

[10] The Committee reaches results through discussion aimed at building consensus or, if necessary, by majority vote. Employees are informed of the Committee's decisions on promotion requests by way of a Minute Sheet, detailing the result reached and the rationale for the result. The Committee may, where relevant, consider incumbents' past Minute Sheets in reaching decisions on advancement requests.

[11] DS employees who are dissatisfied with a Committee determination may seek to have it reviewed through an Independent Recourse Mechanism (IRM), which is not meant to re-do the evaluation but, rather, to ensure that it was conducted in conformity with the requirements of the DS Salary Administration System. Grounds for review are provided in section 2.2 of

*The Independent Recourse Mechanism (IRM): Addendum to the DS Salary Administration*

*System* (IRM Addendum) (Appeal Book, Vol. 1, p. 214) and include:

- a) The applicant did not have access to guidance material pertaining to the career progression process, and would have presented her/his case differently if she/he had had access to this information. This different presentation could potentially have changed the decision of the [Committee];
- b) The [Committee], in making its decision, took into consideration additional information not originally included in the applicant's submission to the [Committee], and this additional information proved inaccurate;
- c) The [Committee] did not possess sufficient proficiency in the official language of the applicant's submission or failed to assess the dossier in the official language of the applicant's choice;
- d) The decision of the [Committee] was based on grounds other than the career progression criteria; and
- e) Abuse of authority.

[12] Dr. Gladman, who has a doctorate degree in military history, has worked as a researcher and analyst at DND since 2003. In 2009 he wrote a book entitled *Intelligence and Anglo-American Air Support in World War Two: The Western Desert and Tunisia, 1940-43*. In 2014, his application for promotion from the DS-04 to the DS-05 level was denied. The Minute Sheet refusing his promotion noted that Dr. Gladman was "progressing very well" towards the DS-05 level and that, to attain that level, Dr. Gladman should "continue [his] contributions to achieve a consistent multi-year history of creativity and superior impacts" (Appeal Book, Vol. 2, p. 410).

[13] Dr. Gladman determined that he wished to again apply for the same promotion in 2015. He submitted a draft PER to his managers in which he requested the promotion and described what he considered to be his consistent multi-year record of creativity and impact. In support of this assertion he relied in significant part on his 2009 book.

[14] Dr. Gladman's managers were initially reluctant to support his 2015 promotion request, believing that not enough time had passed since his unsuccessful application of a year earlier and that he accordingly would have difficulty demonstrating a sufficient multi-year record of creativity and impact to ensure that his application would be successful. However, following the intervention of Dr. Gladman's bargaining agent, his managers were persuaded to support his 2015 promotion request. They finalized the PER initially prepared by Dr. Gladman by shortening it somewhat. Despite having the opportunity to do so, Dr. Gladman did not provide any additional comments in the final PER.

[15] In early 2015, the Committee considered Dr. Gladman's promotion request – along with those of several others – and denied Dr. Gladman's 2015 application as well as those of four other employees. In its April 2015 Minute Sheet summarizing the decision on Dr. Gladman's application, the Committee noted that only incremental evidence relating to the previous year's recommendations had been provided and that Dr. Gladman had thus not succeeded in establishing the sustained degree of creativity and impacts required to support the requested promotion to the DS-05 level.

[16] Dr. Gladman sought to have the Committee's decision reviewed via the Independent Recourse Mechanism, and DND appointed a senior scientist from Natural Resources Canada to conduct the review. In his application for review, Dr. Gladman raised the following grounds: first, that the career progression process was not applied correctly; second, that the decision of the Committee was based on grounds other than the career progression criteria; and finally, that there had been an abuse of authority by the Committee.

[17] Dr. Gladman provided detailed submissions in support of his application, including his contention that the DS Salary Administration System does not require a sustained multi-year demonstration of the impact competency at the DS-05 level, pointing in this regard to the absence of such wording in the descriptor for this competency at the DS-05 level as compared to the specific mention of a multi-year demonstration for other competencies at the DS-05 level and in the descriptor for the impact competency at the DS-06 level. Dr. Gladman also claimed that he had been unfairly disadvantaged in the process as management “ha[d] ‘the pen’” in drafting his PER (Appeal Book, Vol. 2, p. 341); he thus submitted his original, longer draft PER for the Reviewer to consider.

[18] In accordance with the requirements enshrined in subsection 3.4.2 of the IRM Addendum, the Reviewer required both Dr. Gladman and DND management to submit and exchange all the written material they wished the Reviewer to consider. The Reviewer also conducted interviews with Dr. Gladman and three members of the Committee. The Reviewer tendered a draft report to DND management in early July and then filed his final report on July 23, 2015. The final version was amended somewhat from the earlier draft version, largely for clarity.

## II. The Report of the Reviewer – the Decision under Review

[19] In his report, the Reviewer concluded that the Committee’s process was fully satisfactory. He thus recommended that the decision of the Committee, denying Dr. Gladman’s requested promotion, should remain in effect. The Reviewer also recommended that management should hold an informal discussion with Dr. Gladman to fully explain the reasons for the denial and that



Dr. Gladman and management should collaborate to develop a plan for Dr. Gladman's career advancement.

[20] In arriving at this conclusion, the Reviewer considered and rejected Dr. Gladman's position that it was contrary to the DS Salary Administration System to require an incumbent to have demonstrated a sustained multi-year impact at the DS-05 level. In his report, the Reviewer also noted that his interviews with Committee members revealed that during Committee deliberations Dr. Gladman's manager had altered his position from initially supporting the requested promotion to sharing the consensus view that Dr. Gladman's application should be rejected.

[21] The Reviewer's report was submitted to the Deputy Minister, who approved its conclusions and recommendations in a letter to Dr. Gladman dated September 3, 2015. As the letter contains no analysis of the issues, the parties concurred that the reasons set out in the Reviewer's report should be considered to be those of the Deputy Minister. Such agreement is consistent with the case law of this Court and of the Federal Court, which establishes that where a decision-maker endorses a conclusion in a report without providing its own reasons, the decision-maker's reasons are to be taken to be those set out in the report: see, for example, *Canada (Public Safety and Emergency Preparedness) v. Khalil*, 2014 FCA 213 at para. 29, 464 N.R. 98; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para. 37, [2006] 3 F.C.R. 392; *Tan v. Canada (Attorney General)*, 2015 FC 907 at para. 48 (available on CanLII).

### III. The Decision of the Federal Court on the Points in Issue in this Appeal

[22] As Dr. Gladman raises before us only two of the several arguments he made before the Federal Court, it is only necessary to review the portions of the Federal Court's reasons that relate to these grounds. To put these portions of the Federal Court's reasons into context, it is helpful to first outline the arguments that Dr. Gladman makes on appeal.

[23] Dr. Gladman first submits that the Federal Court erred in concluding that there had been no denial of procedural fairness by the Reviewer. While recognizing that his rights to procedural fairness before the Reviewer may well have fallen toward the lower end of the spectrum, Dr. Gladman maintains that these rights were nonetheless infringed as he was entitled at a minimum to be provided with a summary of the information obtained by the Reviewer in his interviews of Committee members and to have been afforded the opportunity to reply to such disclosure. The only particulars Dr. Gladman provides as to what he might have submitted to the Reviewer – had such disclosure been made – are set out in paragraph 13 of his affidavit (Appeal Book, Vol. 1, p. 54). He there explains that, had he been told that his manager had changed his mind during the Committee deliberations, he would have stated the following to the Reviewer:

[...] [researchers] are entirely dependent upon [their] managers to explain what [they] have accomplished as researchers. In my case, I gave [my manager] some notes; he asked me to cut those notes down to a single page, and so I did so. I would have explained that [my manager's] actions were prejudicial to my application for a promotion and inconsistent with my reasonable expectations of the conduct of the [Committee] meeting.

[24] Dr. Gladman secondly submits that the Federal Court erred in finding that the Reviewer's treatment of the merits of his application was reasonable. He says more specifically that the Reviewer failed to grapple with the essence of the argument he made to the effect that it constituted an impermissible addition to the DS Salary Administration System to require demonstration of sustained, multi-year impacts in his case. He asserts that it is an unreasonable interpretation of the DS Salary Administration System to insert such a requirement at the DS-05 level in the absence of wording so providing, especially when such wording is present in respect of other factors at the DS-05 level and for the impact competency at the DS-06 level.

[25] The Federal Court dismissed both of these arguments. It applied the correctness standard of review to the procedural fairness issue and the reasonableness standard to the Reviewer's treatment of the impact competency at the DS-05 level.

[26] On the procedural fairness point, relying on *Potvin v. Canada (Attorney General)*, 2005 FC 391, 280 F.T.R. 93, the Federal Court held that the provisions of the IRM Addendum codified the extent of procedural fairness owed to Dr. Gladman. The Court further held that all disclosure requirements were fully enshrined in subsection 3.4.2 of the IRM Addendum, which does not require disclosure of the information obtained during interviews conducted by a reviewer. The Federal Court thus concluded that Dr. Gladman was not entitled to disclosure of the material facts gathered by the Reviewer in his discussions with Committee members.

[27] The Court also considered and rejected the argument that Dr. Gladman was entitled to the disclosure in question under a common law duty of procedural fairness. Relying on the

judgments of this Court in *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 [*Boogaard*] and *Agnaou v. Canada (Attorney General)*, 2015 FCA 29, 478 N.R. 118 [*Agnaou*] and the decisions of the Federal Court in *Hale v. Canada (Treasury Board)* (1996), 112 F.T.R. 216, [1996] 3 F.C. 3 and *Begin v. Canada (Attorney General)*, 2009 FC 634 (available on CanLII), the Federal Court held that the level of procedural fairness owed to Dr. Gladman was at the low end of the spectrum because there is no inherent right to a promotion and the process adopted by the Committee and the Reviewer was non-adversarial in nature. The Federal Court concluded that all that was required by this low level of procedural fairness was the right to make submissions to the Reviewer and thus included neither an entitlement to summaries of the interviews conducted by the Reviewer nor the right to make submissions about them.

[28] As concerns the assertion that it was unreasonable to conclude that a demonstration of sustained multi-year impacts was required at the DS-05 level, the Federal Court held that it was a permissible interpretation of the DS Salary Administration System to require such a demonstration as a reasonable elaboration of the impact requirement for the promotion, as contemplated in *Ollevier v. Canada (Attorney General)*, 2008 FC 199, 323 F.T.R. 207. The Federal Court concluded that this was a reasonable elaboration on several bases, as set out in paragraphs 47, 49, 54 and 56 of the Federal Court's Reasons, namely:

- the DS-05 level “is meant for mature, experienced officers who have established a recognized reputation and professional competency and leadership in a complex area of science and defence technology”;

- the description of the DS-05 classification provides that an incumbent's abilities must have been "consistently demonstrated";
- "[t]he description under the 'Impact' criterion [for the DS-05 level requires] 'superior impacts on client policy, equipment, engineering or operational issue[s], by exploiting the application of technology and/or defence scientific analyses'";
- the DS Salary Administration System contemplates in several places that salary increases (within a classification range) would normally require evidence spanning more than one year;
- the multi-year criterion for the impact competency was applied to Dr. Gladman's 2014 promotion request;
- Dr. Gladman himself, in his 2015 PER, made reference to this requirement and alleged he met it; and
- there was no suggestion that the requirement for demonstration of sustained multi-year impacts at the DS-05 level had been applied inconsistently by the Committee.

#### IV. Analysis

[29] The standard of review applicable in this appeal has been prescribed by the Supreme Court of Canada in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. That standard requires an appellate court to step into the shoes of the trial court, determine whether that court selected the appropriate

standard of review and, if so, assess whether it applied that standard correctly. Thus, this Court is in effect called upon to re-conduct the required judicial review analysis.

[30] I concur with the Federal Court that the procedural fairness issue is reviewable for correctness, or, to put the matter another way, it is for this Court to determine whether Dr. Gladman's procedural fairness rights were respected: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*]; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339; *Pierre v. Canada (Border Services Agency)*, 2016 FCA 124 at para. 8, 488 N.R. 176. I also agree that the reasonableness standard applies to the Reviewer's treatment of the impact competency at the DS-05 level, it being well-settled that decisions that concern labour and employment issues that are heavily factually-infused are entitled to significant deference: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 53-54, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 74 (available on CanLII); *Boogaard* at para. 33.

A. *Was the decision regarding the requirement of a multi-year demonstration of sustained impacts reasonable?*

[31] Essentially for the reasons given by the Federal Court, I would conclude that the result reached and the reasons offered by the Reviewer are reasonable. A fair reading of the Reviewer's reasons demonstrates that, contrary to what Dr. Gladman claims, the Reviewer did consider Dr. Gladman's arguments regarding the scope of the impact criterion at the DS-05 level and concluded that it was a reasonable elaboration of this competency to require that an incumbent

demonstrate sustained multi-year impacts for promotion to the DS-05 level. This is evident from a review of the Reviewer's reasons in their entirety and in particular from the third full paragraph on page 9 of the Reviewer's reasons (Appeal Book, Vol. 2, p. 432), which states:

An issue raised by Dr. Gladman refers to the question of multi-year demonstration of high impact. Quoting the DS [Salary Administration System], he points out that the expression "multi-year" does not appear in the performance indicator for impact at the DS 5 level. However, he also emphasizes that he has demonstrated high creativity and impact for many years at DND. In the opinion of the reviewer, the statements in the 2015 Minute Sheet regarding "sustained creativity and impacts need to be shown within the context of current client requirements" and "such high impact activities need to be demonstrated in a sustained, multi-year fashion" describe reasonable expectations for a DS 5 scientist.

[32] I also believe that it is a reasonable elaboration of the impact competency to require an incumbent to demonstrate sustained multi-year impacts for promotion to the DS-05 level due to the various factors noted by the Federal Court as listed in paragraph 28, above. In short, it is not impermissible to require a demonstration of sustained multi-year impacts for promotion to the DS-05 level merely because the words "multi-year impacts" are not used in the rubric in the DS Salary Administration System for this competency, but appear elsewhere in the document. Given the nature of the work at this level, the overall requirements of the DS-05 level and the importance accorded to the consistent demonstration of an incumbent's abilities in the DS Salary Administration System for promotion to the DS-05 level, it cannot be said that the Reviewer's endorsement of the Committee's interpretation of the impact criterion was unreasonable. Thus, in my view, the challenge to the reasonableness of the decision and of the Reviewer's reasons fails.

B. *Were Dr. Gladman's procedural fairness rights violated?*

[33] As for the procedural fairness issue, like the Federal Court, I would conclude that there was no violation of Dr. Gladman's procedural fairness rights. However, I reach that conclusion for different reasons.

[34] Contrary to what the Federal Court held, it is not a complete answer to Dr. Gladman's procedural fairness assertions to point to the lack of provision for the disclosure Dr. Gladman seeks in the text of the IRM Addendum. The IRM Addendum is not a complete codification of his procedural fairness rights. Rather, as Dr. Gladman submits, he has rights to procedural fairness at common law as indeed section 2.1 of the IRM Addendum recognizes (Appeal Book, Vol. 1, p. 214). In outlining the key principles applicable to the IRM, section 2.1 of the IRM Addendum states:

The principles of natural justice should apply to the process used for all applications for recourse submitted by researchers. These principles include, among others, the right to procedural fairness, including: the right to be heard, the right to representation, and the right to ask questions and contradict evidence.

[35] Thus, it is necessary to ascertain the scope of Dr. Gladman's common law procedural fairness rights. These are not settled by *Boogaard* nor by *Agnaou*, which dealt with different regimes.

[36] In the absence of binding authority on the point, one must consider the factors listed in *Baker* to determine the scope of Dr. Gladman's procedural fairness rights in the IRM process. These factors include: the nature of the decision and of the procedures followed by the decision-



maker in making it or the “closeness of the administrative process to the judicial process”; the requirements (if any) of the statute under which the decision is made and the role of the particular decision within the statutory scheme; the importance of the decision to the individual affected; the legitimate expectations of the affected individual regarding what procedures would be followed; and the choices made by the decision-maker regarding procedure, especially where the decision-maker is afforded the right to establish its own procedures: *Baker* at paras. 23-28.

[37] Here, several of these factors point to Dr. Gladman’s procedural fairness rights being towards the lower end of the spectrum. The process for the IRM is not adversarial but, rather, inquisitorial or investigative, indicating that a lower degree of procedural fairness is required. There is no statute that deals with the extent of disclosure required and the IRM Addendum does not make specific provision for disclosure of the contents of the Reviewer’s interviews – again pointing to a lower degree of procedural fairness. The issue is doubtless one of importance to Dr. Gladman, but is not as vital as might be the case if his employment were in jeopardy and, as noted in *Boogaard*, employees have no right to a promotion. Thus, this factor also points towards Dr. Gladman’s participatory rights being towards the lower end of the spectrum.

[38] The last two factors mentioned in *Baker* are largely irrelevant to the present case. There is no indication of the nature of Dr. Gladman’s expectations or any basis for him to have developed any particular expectations as to what he would be told about whatever interviews the Reviewer might have chosen to conduct. Finally, the last factor from *Baker* is inapplicable as it points to procedural choices made for a particular class of cases or types of situations by decision-makers of a more institutional nature than a reviewer conducting a single review under a policy like the

IRM Addendum. Although the list of factors provided in *Baker* is non-exhaustive, Dr. Gladman has not pointed to any additional elements for consideration.

[39] Thus, the relevant factors point to Dr. Gladman's procedural fairness rights being at the lower end of the spectrum. However, this does not mean that such rights are non-existent. As both parties concurred during the hearing, Dr. Gladman's procedural fairness rights must be found to include the right to be informed of any prejudicial material facts that might have been discovered by the Reviewer during the interview process and the right to make submissions about such facts.

[40] Unless the legislator provides otherwise, the right to be informed of undisclosed adverse material facts being considered by a decision-maker and to make submissions about them (in some form) is the minimum level of fairness owed to anyone whose rights, privileges or interests are being impacted by a public decision-maker. As noted by the Supreme Court of Canada and this Court, such disclosure and a corresponding opportunity for submissions prevent an impacted individual like Dr. Gladman from being kept in the dark about a process that will ultimately decide for or against his or her interests and ensure that the impacted individual is in a position to meaningfully challenge a decision using the recourse that is available: *I.W.A., Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at pp. 338-339, 68 D.L.R. (4th) 524; *Shephard v. Fortin*, 2004 FCA 254 at para. 27, 242 D.L.R. (4th) 529; *Bulat v. Canada (Treasury Board)*, [2000] F.C.J. No. 148 at para. 10, 252 N.R. 182 (F.C.A.); *Danakas v. Canada (War Veteran's Allowance Board)* (1985), 59 N.R. 309 at pp. 310-311, 10 Admin. L.R. 110 (F.C.A.). In the public sector employment re-classification context – which is somewhat akin to a case for

a promotion – this Court has noted that claimants’ procedural entitlements fall on the low end of the spectrum, but nonetheless include a right to be informed of new adverse facts that arise and to respond to such disclosure: *McEvoy v. Canada (Attorney General)*, 2014 FCA 164 at paras. 20-21, 465 N.R. 384; *Chong v. Canada (Attorney General)* (1999), 170 D.L.R. (4th) 641 at paras. 12-14, 236 N.R. 371 (F.C.A.).

[41] Thus, the issue for determination is whether the Reviewer discovered during his interviews of Committee members any material fact that was prejudicial to Dr. Gladman. Dr. Gladman points to the fact that his manager changed his mind about the merits of Dr. Gladman’s promotion during the Committee deliberations as being a key prejudicial fact that the Reviewer should have disclosed to Dr. Gladman.

[42] I disagree. The fact that a single member of the Committee changed his mind is not a relevant consideration to the review undertaken by the Reviewer and thus need not have been disclosed to Dr. Gladman.

[43] The fact that a Committee member changed his or her views on Dr. Gladman’s promotion request was not a relevant issue for consideration by the Reviewer for three reasons. First, and most importantly, the DS Salary Administration System Committee process contemplates that Committee members may change their minds – how else could a consensus decision short of a vote be reached? Thus, the fact of a Committee member’s changing his or her mind about the merits of a candidacy cannot be an abuse of authority or an abuse of process as the very nature of the evaluation system implemented by the employer – following consultation

with the employees' bargaining agent – contemplates that such changes may occur. Secondly, the Reviewer is not charged with re-conducting the evaluation of the merits of a promotion request but, rather, with ensuring that the Committee's evaluation was conducted in conformity with the requirements of the DS Salary Administration System. The views of a single member of the Committee are irrelevant to this issue. Finally Dr. Gladman's manager was but one member of a Committee that included eleven additional regular members as well as the Chairperson and an HR professional. In addition, Dr. Gladman's manager was only one of two Committee members who appear to have initially supported Dr. Gladman's promotion. Thus, his changing his opinion had minimal impact on the outcome of the Committee's determination.

[44] The lack of materiality of the change of heart by Dr. Gladman's manager during the Committee deliberations is demonstrated by what Dr. Gladman says he would have submitted to the Reviewer had he known of his manager's changed views.

[45] Dr. Gladman says that he would have first told the Reviewer that he was dependent on his managers to explain his position and that they drafted the PER. However, the former point was self-evident to the Reviewer from the role assigned to employees' managers in the promotion process under the DS Salary Administration System and the latter point was fully addressed by Dr. Gladman's submission to the Reviewer of his own, longer draft version of the PER.

[46] Dr. Gladman secondly says that he would have told the Reviewer that his manager's actions were prejudicial to his promotion application and inconsistent with what Dr. Gladman

claims were his reasonable expectations for the conduct of the Committee meeting. The former assertion is self-evident and irrelevant to the inquiry that the Reviewer was conducting. As for Dr. Gladman's expectations, I disagree that it was reasonable for him to assume that his manager would not alter his views during the Committee deliberations, where it was open to Committee members to do so and the initial managerial endorsement of his request for promotion was only obtained after the intervention of the bargaining agent. In any event, whatever Dr. Gladman's expectations might have been as to his manager's likely conduct, these are simply irrelevant to the issues the Reviewer was tasked with examining.

[47] Thus, while I appreciate that Dr. Gladman might well have been upset and disappointed by his manager's alteration of position during the Committee deliberations, the failure of the Reviewer to disclose this to Dr. Gladman before his report was completed does not constitute a violation of Dr. Gladman's procedural fairness rights.

V. Proposed Disposition

[48] I would accordingly dismiss this appeal with costs. The parties submitted that, regardless of who succeeded on the appeal, costs should be fixed in the all-inclusive amount of \$2,500.00. I concur that this is appropriate and would accordingly fix the costs of this appeal in that amount.

“Mary J.L. Gleason”

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J.A.

“I agree.

Eleanor R. Dawson J.A.”

“I agree.

Yves de Montigny J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-304-16

**STYLE OF CAUSE:** BRAD GLADMAN v. ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 2, 2017

**REASONS FOR JUDGMENT BY:** GLEASON J.A.

**CONCURRED IN BY:** DAWSON J.A.  
DE MONTIGNY J.A.

**DATED:** MAY 25, 2017

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